92-1749

No.

Supreme Court, U.S.
FILED
MAY 3 - 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

THOMAS F. ICARD, JR., as Trustee, and FAYE ICARD HUSKINS, as Trustee-designate,

Petitioners,

v.

SARASOTA-MANATEE AIRPORT AUTHORITY, a body politic and corporate,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

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Attorneys for Petitioners

QUESTIONS PRESENTED

1. Do frequent, regular, low altitude, direct invasions of the super-adjacent airspace over private property by commercial, jet aircraft arriving and departing from a public airport constitute a physical invasion so as to establish a permanent (as distinguished from a temporary) "taking", within the meaning of the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. If the answer to Question 1 is "yes", does a judicial finding of such a physical invasion of private property presumptively establish a taking *per se*, so as to entitle the claimant to a jury determination of the extent of damages incurred as a result of the taking, if any?

3. If the answer to Question number 2 is "yes", is a state court finding of such a physical invasion of private property accompanied with the determination that a claimant must also prove a reduction in the market value of the property in order to establish a taking as defined above and as a condition precedent to a jury determination of the extent of damages incurred as a result of the taking, if any, contrary to applicable decisions of this Court?

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In The

Supreme Court of the United States

October Term, 1992

No.

THOMAS F. ICARD, JR., as Trustee, and FAYE ICARD HUSKINS, as Trustee-designate,

Petitioners,

v.

SARASOTA-MANATEE AIRPORT AUTHORITY, a body politic and corporate,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

Pursuant to Rule 16.1 of this Court, petitioners here seek a summary disposition on the merits, reversing the November 20, 1992 opinion and order of the District Court of Appeal of Florida, Second District, in this case. (App. 1a).

OPINIONS BELOW

The Partial Summary Judgment in favor of petitioners issued by the Circuit Court of the Twelfth Judicial Circuit of Florida, dated August 23, 1989, is unreported and is reproduced in Appendix B (3a). The opinion and order of the District Court of Appeal of Florida, Second District, dated September 7, 1990 (referenced herein as "*Icard 1*"), is reported at 567 So.2d 937 and is reproduced in Appendix G (12a). The Order of the Supreme Court of Florida denying petitioners' Notice to Invoke Discretionary Jurisdiction, dated January 16, 1991, is reported at 576 So.2d 288 and is reproduced in Appendix C (5a). The Final Judgment of the Circuit Court of the Twelfth Judicial Circuit of Florida, dated July 25, 1991, is unreported and is reproduced in Appendix D (6a). The opinion and order of the District Court of Appeal of Florida, Second District, dated November 20, 1992 (referenced herein as "*Icard 2*"), is unreported and is reproduced in Appendix A (1a). The Order of the District Court of Appeal of Florida, Second District, denying petitioners' Motion for Rehearing or for Clarification, Motion for Rehearing En Banc and Motion for Certification as Passing Upon a Question of Great Public Importance and of Direct Conflict with Decisions of another District Court of Appeal and of the Supreme Court of Florida, dated January 28, 1993, is unreported and is reproduced in Appendix E (8a). The Order of the Supreme Court of Florida denying the petitioners' second Notice to Invoke Discretionary Jurisdiction is not, as yet, reported and is reproduced in Appendix F (10a).

JURISDICTION

The judgment or decree here sought to be reviewed is the opinion and order of the District Court of Appeal of Florida, Second District, entered on November 20, 1992 (App. 1a). The order of that Court denying petitioners' Motion for Rehearing, etc., was entered on January 28, 1993 (App. 8a). The order of the Florida Supreme Court denying discretionary review in this case was entered on March 15, 1993 (App. 10a). This Court has jurisdiction, pursuant to 28 U.S.C. § 1257(a) and Rule 10.1(c) of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (emphasis added).

Section 1. of the of the Fourteenth Amendment to the Constitution of the United States provides as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF THE CASE

The petitioners own two residences situated on 39 acres of otherwise unimproved, residentially zoned, bayfront real property located 5,500 to 6,000 feet northwest of the end of the major runway of the Sarasota-Bradenton airport, which ownership predates the existence of the airport. Commercial jet aircraft arriving and departing from the airport traverse the super-adjacent airspace directly over the petitioners' property hundreds of times per month. The minimum glide slope of approaching jet aircraft extends from 148 feet to 118 feet above ground level.

The airport is owned and operated by the Sarasota-Manatee Airport Authority (the "Authority"), which is empowered by Chapter 31263 of the Laws of Florida to:

> acquire, by gift, purchase or the exercise of eminent domain, any land or *rights in land* deemed necessary in connection with the improvement or operation of its "airport facilities." "Airport facilities" is defined, in part, as "all properties rights, *easements*, and franchises relating thereto." (emphasis added).

In 1984, the petitioners brought this inverse condemnation action, seeking a judicial determination that the constant jet aircraft overflights had ripened into the taking of an avigational easement through the property. In May, 1989, the petitioners moved for partial summary judgment on the limited issue of whether a taking had occurred, reserving for a subsequent determination the amount of the petitioners' damages, if any.

At the summary judgment hearing on August 8, 1989, the parties stipulated that they would not present argument as to whether the overflights had negatively affected the value of the property since there was a factual dispute as to that issue. Addressing the court with respect to the stipulation, petitioners' counsel stated as follows:

> The stipulation that we've entered into about market loss really crystallizes the disputed legal issue here.
>
> Namely, that the defend8ant contends that the plaintiff must prove substantial market loss to the effected [sic] property as an essential element to finding whether there's been a taking.
>
> The plaintiff's position is the issue of market loss is totally irrelevant as a matter of law to the issue of whether there's been a taking under the constitutions of Florida in [sic] the United States.

Petitioners' counsel then addressed the distinction recognized in the decisions of this Court between a regulatory taking and those involving a physical trespass or invasion, relying specifically upon the decision of this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Counsel further argued that, under both the Florida and U.S. Constitutions, where the "government chooses to invade property, then by its physical intrusion alone, the law is that there will be a taking found." (Transcript of 8/8/89 hearing, at page 8).

Counsel for petitioners argued that this Court "disagreed very strongly with the New York Court of Appeals" in the *Loretto* case and quoted at length from this Court's opinion with respect to "whether a minor but permanent physical occupation" of an owner's property authorized by the government constitutes a taking of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution and that, quoting this Court, "we have long considered a physical intrusion by the government to be a property restriction of unusually serious character for purposes of the takings clause". (Transcript of 8/8/89 proceedings, at pages 10-11).

Petitioners' counsel then argued at length based on the opinions of this Court in *United States v. Causby*, 328 U.S. 256 (1946) and *Griggs v. County of Allegheny*, 369 U.S. 84 (1962). Petitioners' counsel relied on *Causby* as establishing the "proposition that direct overflights are physical invasions,"

analogizing the flight path to "an elevated railway" which would be a taking if it were erected at the precise altitude where the planes were flying even if none of the supports of the hypothetical structure "rested on the land." (Transcript of 8/8/89 proceedings, at pages 14 and 15).

In his argument to the trial court on behalf of the Authority, respondent's counsel focused on the decisions of this Court as they pertain to the issue of whether constant jet overflights constitute a permanent physical invasion and whether physical invasion alone, without conclusive proof of resulting, negative market value impact, is sufficient to establish a taking under the Constitution of the United States. (Transcript of 8/8/89 proceedings, at pages 61-63).

Citing *Causby* and *Griggs*, the trial court subsequently ruled in favor of the petitioners on their Motion for Partial Summary Judgment, finding that, in order to establish a taking, "there is no need to concurrently establish legal damage to the property." Finding further that resolution of the taking issue is not an entitlement to damages, the Court found that the determination of a taking is the "first step in the resolution" of an inverse condemnation claim. Further finding the extent and character of the overflights and the resulting interference with the petitioners' property to be "uncontradicted", the Court ruled that a taking by the Authority had "occurred through inverse condemnation", but that "the extent of the easement taken, and the damages, if any, are not determined or resolved here" and would instead be "reserved for further proceedings". (App. 3a)

Rather than proceed to trial on the basis established by the trial court's rulings on the market damage requirement issue described above, the Authority appealed to the District Court of Appeal of Florida, Second District (*Icard I*). Although the parties presented extensive argument in their briefs to the Second District concerning the proper interpretation of this Court's opinions in *Causby* and *Griggs*, the Second District did not address *Causby* or *Griggs* in its opinion in *Icard I* (App. 12a). The court did, however, conclude that the evidence below concerning "the altitude of the flights, the frequency of the flights and the amount of interference with the appellees' enjoyment of the property . . .

was sufficient to support a taking, *provided that the Appellees can [also] prove substantial market value damage on remand."* (emphasis added). Although the Second District thus found the *record evidence* concerning the government's *physical invasion* of the property to be *otherwise* sufficient to establish a taking, that Court reversed the trial court's determination that the property owner need not also "concurrently establish legal damage to the property" in order to prove a taking.

This determination by the Florida Second District Court of Appeal concerning the market damage requirement issue with respect to a taking has been briefed and argued (based on the controlling decisions of this Court) in every subsequent proceeding in the Florida court system in this case from the trial court level to the intermediate, district court of appeal and the Supreme Court of Florida. The determination of the Florida courts with respect to this issue has ultimately proven to be determinative in this case.

Following the Florida Supreme Court's denial of discretionary review of the Second District's opinion in *Icard I* (App. 5a), this case was remanded back to the trial court on the market value issue only. Following a non-jury trial, the trial court issued its final judgment, stating:

> In prior proceedings this court held, and the appellate court agreed, that evidence submitted on behalf of the Plaintiffs was sufficient to support a taking of their property by the Defendant, *provided* the Plaintiffs could prove their property had suffered "substantial market value damage." *Sarasota-Manatee Airport Authority v. Icard*, et al., 567 So.2d 937 (Fla. 2d DCA 1990) (emphasis that of the Court; App. 6a).

While the trial court thus *again* found the evidence of physical invasion in the record *otherwise* sufficient to establish a taking, the Court also found expert testimony on the market value damage issue to be in conflict. On that basis, the trial court ruled that the petitioners failed to prove market value damage and, therefore, ruled in favor of the Authority (App. 6a).

Petitioners then initiated in the District Court of Appeal of Florida, Second District, the current appeal of this case. In addition to challenging the evidentiary basis of the trial court's determination on the market value issue[1/], petitioners also *again* argued below that the trial court erred in any event by applying the market value damage requirement established in *Icard 1* as a condition precedent to the establishment of a taking - contrary to the express and unequivocal prior rulings of this Court (Initial Brief of Appellant in *Icard 2*, at pages 35 to 41).

The Second District again ruled in favor of the Authority, citing its prior decision in *Fields v. Sarasota-Manatee Airport Authority*, 512 So.2d 961 (Fla. 2d DCA, 1987) *rev. den.*, 527 So.2d 584 (Fla. 1988). The Court's opinion in *Icard 1* (App. 12a) goes beyond its opinion in *Fields*, however, because the market damage requirement was imposed in *Icard 1*, notwithstanding the Court's express finding in *Icard 1* that the record proof of physical invasion was *otherwise* sufficient to establish a taking (a finding absent from the Second District's prior opinion in *Fields*).

The Second District issued its opinion and order on November 20, 1992 (App. 1a) and issued its order denying the petitioners' timely motion for rehearing, etc., on January 28, 1993 (App. 8a). The Supreme Court of Florida subsequently denied petitioners' timely notice to invoke the discretionary jurisdiction of that Court, on March 15, 1993 (App. 10a).

[1/] The petitioners contended that undisputed or admitted evidence below demonstrated substantial, negative market value effect (including government zoning of the property as noise sensitive and requirements of extra expense in order to build on the property, the latter resulting in admitted, direct market value diminution).

Petitioners further contended that the purported conflict in expert evidence was actually based on an incorrect legal premise (i.e., that so long as real estate inflation outstrips the negative effect of the overflights, there is no taking, even if, as here, the property would be worth twice as much without the invasion - thus treating a gradually increasing physical invasion different from the same invasion upon the opening of a new airport.

REASONS FOR GRANTING SUMMARY DISPOSITION OF REVERSAL

The respondent argued below that, because the invasions are intermittent, they at most create at *temporary* rather than a *permanent* taking. This court addressed the issue in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which involved an easement through private property to provide public beach access. There, this Court stated:

> "To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . 'a mere restriction on its use'. . . is to use words in a manner that deprives them of all their ordinary meaning."
>
> . . .
>
> We think a 'permanent physical occupation' has occurred, for purposes of [the *Loretto*] rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan*, 483 U. S. at 830, 832.

The rule is no different when the physical invasion is *over* the property. The leading case with respect to aircraft overflights is *United States v. Causby*, *supra*, which is cited in *Loretto*, *supra*, as an example of permanent physical invasion. *Causby* holds that direct overflights are physical invasions that are takings *even if the use of the property below is not destroyed*. *Id.* at 262. *Causby* held that flights below navigable airspace (500 to 1,000 feet) are an impermissible infringement on private property. *Id.* at 265.

> The fact that (the landowner) does not occupy it (his overhead airspace) in a physical sense - by the erection of buildings and the like - is not material. As we have said, the flight of airplanes, which

> skim the surface but do not touch it, is as much of an appropriation of the use of the land as a more conventional entry upon it . . . .
>
> The super-adjacent airspace at this low altitude is so close to the land that continuous invasion of it affect the sue of the surface of the land itself. We think the landowner, as an incident to his ownership, has a claim to it and that invasion of it are in the same category as invasion of the surface. *Causby*, 328 U.S. at 264, 265.

This Court then set out the elements for the cause of action of the *de facto* taking of an avigation easement in a direct overflight case:

1. Direct overflights of private land.
2. At low altitude.
3. With frequency.
4. Causing a direct and immediate interference with the enjoyment and use of the land.

Market Loss was not, in itself, segregated as an element to this cause of action.

After *Causby*, Congress redefined "navigable airspace" to include the glide slope for safe approach and departure paths. These glide slopes were necessarily *below* the minimum permissible altitudes established by *Causby* as the taking threshold (500 feet over rural areas and 1,000 feet over urban).

Then, in *Griggs v. County of Allegheny*, 369 U.S. 84 (1962), this Court held that even if overflights were in redefined "navigable airspace," as in the approach areas, such would amount to a compensable taking for which the airport operator would be liable.

The *Griggs* property was within 3,250 feet from the runway, in the approved "approach areas" of the airport's master plan. The 40:1 safe glide slope meant that for every 40 feet of horizontal distance of the ground, the aircraft would rise 1 foot

vertically. Thus, at 3,250 feet from the runway, the bottom of the minimum safe approach area was 81 feet (3, 250 divided by 40). There was a clear and direct interference with the use of the property below. See *Griggs*. The types of interference noted in *Griggs* (vibrations, communications, sleeping) are the same as found uncontradicted in the instant case of the Icard family. In *Griggs*, there is, again, no inclusion of market loss as an essential element of the cause of action.

Accordingly, a requirement of proof of "market loss" in a case involving direct physical invasion of airspace is a clear violation of *Loretto* and an unsupported adjunct to the *Causby* and *Griggs* decisions.

Last year, this Court issued a further decision expressly and specifically reaffirming its prior determinations that, in physical invasion cases (including, specifically, airport overflight cases) no inquiry into market value damage is appropriate. In *Lucas v. South Carolina Coastal Council*, ____ U.S. ____, 112 S.Ct. 2886, 2893 (1992), this Court stated:

> "We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. [Citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 u.s. 419 (1982); other citations omitted] . . . See also *United States v. Causby*, 328 U.S. 256, 265 and n. 10 (1946) (*physical invasions of airspace*) (emphasis added).

Thus, as recently as June, 1992, this Court has reaffirmed its earlier findings that an airport overflight case, such as *Causby*, is, indeed, an example of a permanent, physical "invasion", so as

to establish a compensable taking, "**no matter how minute the intrusion** . . ."

It is thus apparent that the burden of proof to establish a taking of an avigational easement in Florida directly conflicts with the prior decisions of this Court. Because the issue of burden of proof in an inverse condemnation case is so substantially intertwined with the Constitutional right of an owner to the quiet use and enjoyment of his property, the issue clearly presents a question of great public importance justifying consideration and requiring resolution by this Court.

By their rulings below in this case, the Courts of Florida have rendered dispositive the ruling of law announced by the District Court of Appeal of Florida, Second District, in *Icard I* that, even in cases involving direct, physical invasion of private property, there is a legal necessity to *also* prove a reduction in the market value of the property in order to establish a "taking" within the meaning of the Fifth and Fourteenth Amendments to the Constitution of the United States. As demonstrated above, this determination of law conflicts with applicable decisions of this Court on the issue. A summary reversal is thus required in order to preserve equal protection of the laws of the United States to the owners of private property in the State of Florida.

In a larger sense, it should also be noted that Florida is a state in which laws pertaining to land use issues, as well as the regulation and protection of private property interests, are of particular significance because of the State's fragile, natural environment and resulting heavy regulatory environment. Because of that circumstance and the fact that Florida is currently the fourth most populous state in the country, this erroneous judicial interpretation of federal Constitutional requirements as they pertain to private property interests should not be permitted to stand and potentially influence and confuse the law in other jurisdictions.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted and this Court should issue an order of summary disposition on the merits, reversing the November 20, 1992 judgment of the District Court of Appeal of Florida, Second District, in this case.

Respectfully submitted,

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Attorneys for Petitioners

April 28, 1993

APPENDICES

APPENDIX A

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

No. 91-03679

THOMAS F. ICARD, JR., as Trustee, and FAYE ICARD HUSKINS, as Trustee-designate,

Appellants,

V.

SARASOTA-MANATEE AIRPORT AUTHORITY, a body politic corporate,

Appellee.

Opinion filed November 20, 1992.

Appeal from the Circuit Court
for Manatee County;
Steven L. Dakan, Judge.

Stanley W. Moore and Alan E.
DeSerio of Brigham, Moore,
Gaylord, Wilson, Ulmer,
Schuster and Sachs, Tampa,
and Peter J. Winders of Carlton, Fields, Ward,
Emmanuel, Smith &
Cutler, P.A., Tampa,
for Appellants.

A. Lamar Matthews, Jr., Steven
D. Hutton and Martin Garcia
of Matthews, Hutton &

Eastmore, Sarasota,
for Appellee

PER CURIAM.

Affirmed. *See Fields v. Sarasota-Manatee Airport Authority*, 512 So.2d 961 (Fla. 2d DCA 1987), *rev. den.*, 520 So.2d 584 (Fla. 1988).

LEHAN, C.J., and SCHOONOVER and FRANK, JJ., Concur.

APPENDIX B

CIRCUIT COURT IN AND FOR
MANATEE COUNTY, FLORIDA

No. CA-84-2630

THOMAS F. ICARD, as Trustee, J. PAUL ICARD, as Trustee, THOMAS F. ICARD, as Trustee, THOMAS F. ICARD, and GENE S. ICARD,

Plaintiffs,

V.

SARASOTA-MANATEE AIRPORT AUTHORITY, a body politic and corporate,

Defendant.

PARTIAL SUMMARY JUDGMENT

After hearing on Motion for Partial Summary Judgment, and after review of evidence and arguments of counsel, the Court finds:

1. In claims of airport inverse condemnation; a taking occurs when the jet and plane traffic is frequent, low, a substantial and continuing interference with the owner's use and enjoyment of the property, and directly overhead. *Fields v. Sarasota-Manatee Airport Authority*, 512 So.2d 961 (Fla. 2d DCA 1987), *United States v. Causby*, 328 U.S. 256, (1945), *Griggs v. County of Allegheny*, 369 U.S. 84, (1962).

2. To establish a taking for purposes of this Partial Summary Judgment there is no need to concurrently establish legal damage to the property. The resolution of the taking issue is not an entitlement to damages. Rather, it is the first step in the resolution of the entire claims for inverse condemnation. No cases presented by either side are on point and one appear to infer that the existence of damage is an essential element establishing a taking.

3. There is uncontradicted evidence that flights over Plaintiff's home were frequent, continuing, and a substantial interference with Plaintiff's property (Mrs. Icard's Answers to Interrogatories #17-25). There is uncontradicted evidence that the flights were directly overhead and low. The lowest level of the permitted flight path over the Plaintiff's home was well under 500 feet. From the interrogatories submitted by Plaintiff they were low enough to substantially and continually interfere with normal conversations and the customary use and enjoyment of the home hundreds of times per month.

Therefore, it is ORDERED AND ADJUDGED:

Partial Summary Judgment is GRANTED in favor of the Plaintiff such that a taking by Defendant has occurred through inverse condemnation. The extent of the easement taken and the damages, if any, are not determined or resolved here. Those issues are reserved for further proceedings.

DONE AND ORDERED this 23rd day of August, 1989, in Chambers, Manatee County Courthouse, Bradenton, Florida.

_____

SCOTT M. BROWNELL, CIRCUIT JUDGE

COPIES TO:
S. W. Moore, Esquire
Steven D. Hutton, Esquire

APPENDIX C

576 SOUTHERN REPORTER, 2d SERIES

SUPREME COURT - CONTINUED

Title	Docket Number	*Date	Disposition	**Appeal from and Citation
Icard v. Sarasota-Manatee Airport Authority...	76751	1/16/91	Rev. den.	2d DCA 567 So.2d 937

APPENDIX D

CIRCUIT COURT IN AND FOR
MANATEE COUNTY, FLORIDA

No. CA-84-2630

THOMAS F. ICARD, JR. and J. PAUL ICARD, as Trustees, et al.,
Plaintiffs,

V.

SARASOTA-MANATEE AIRPORT AUTHORITY, etc.,
Defendant.

FINAL JUDGMENT

In prior proceedings this court held, and the appellate court agreed, that evidence submitted on behalf of the Plaintiffs was sufficient to support a taking of their property by the Defendant, *provided* the Plaintiffs could prove their property had suffered "substantial market value damage." *Sarasota-Manatee Airport Authority v. Icard, et al.*, 567 So.2d 937 (Fla. 2d DCA 1990). A subsequent non-jury trial was held in which both parties presented evidence to support their respective positions.

Substantial evidence was presented by both sides, but, as is usually the case in eminent domain proceedings, the case boiled down to a "battle of the experts"--in this case each side's appraisers. Both appraisers had--at least at first glance--equally compelling reasons to support their positions. In the last analysis, however, the Court must find that the Plaintiffs have

failed to prove by the greater weight of the evidence that their property has suffered substantial market value damage to support a claim of inverse condemnation. It is, therefore,

ADJUDGED as follows:

1. The claim of the Plaintiffs for Inverse Condemnation is denied and dismissed, and the defendants shall go hence without day.

2. The court reserves jurisdiction to tax costs, if any.

DONE AND ORDERED in Chambers in Sarasota County, Florida, this 25th day of July, 1991.

_____

STEPHEN L. DAKAN, CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Judgment was furnished by U.S. Mail to S. W. Moore, Esq., 100 Wallace Avenue, Sarasota, FL 34237, A. Lamar Matthews, Jr., Esq., P.O. Box 3258, this ____ day of July, 1991.

_____

Judicial Assistant

APPENDIX E

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

January 28, 1993

No. 91-03679

THOMAS F. ICARD, JR., and FAYE ICARD HUSKINS,

Appellant(s),

V.

SARASOTA-MANATEE AIRPORT AUTHORITY, etc.,

Appellee(s).

BY ORDER OF THE COURT:

Counsel for appellants having filed a motion for rehearing or for clarification; motion for rehearing en banc and motion for certification as passing upon a question of great public importance in the above-styled case, upon consideration, it is

ORDERED that the motions are hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK

c: Alan E. DeSerio, Esq.
Carlton, Fields, Ward,
A. Lamar Matthews, Jr., Esq.

EXHIBIT F

SUPREME COURT OF FLORIDA
MONDAY, MARCH 15, 1993

No. 81,366

THOMAS F. ICARD, JR., ETC., ET AL.,

Petitioners,

V.

SARASOTA-MANATEE AIRPORT AUTHORITY, ETC.,

Respondent.

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So.2d 1369 (Fla. 1980).

No motion for rehearing will be entertained by the Court.

A True Copy

Clerk
TEST:

H
cc: Hon. William A. Haddad,

Hon. Richard B. Shore, III,
Clerk
Hon. Steven L. Dakan, Judge

Peter J. Winders, Esquire
A. Lamar Matthews, Jr.,

Sid J. White
Esquire
Clerk Supreme Court

Brigham, Moore, Gaylord,

Wilson, Ulmer, Schuster &
Sachs, P.S.

By: _____
Deputy Clerk

APPENDIX G

576 SOUTHERN REPORTER, 2d SERIES

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT.

No. 89-03005

SARASOTA-MANATEE AIRPORT AUTHORITY, a body politic and corporate,

Appellant,

V.

THOMAS F. ICARD, JR. and PAUL ICARD, as Trustees; THOMAS F. ICARD, JR., and GENE S. ICARD, as Personal Representatives of the Estate of Thomas F. Icard, Deceased; and GENE S. ICARD,

Appellees.

Sept.7, 1990

Rehearing Denied Oct. 10, 1990.

Inverse condemnation action was brought by residential property owners against airport authority. The Circuit Court, Manatee County, Scott M. Brownell, J., entered partial summary judgment finding that a taking had occurred, and airport authority appealed. The District Court of Appeal, Patterson, J., held that: (1) taking could not be found absent proof of substantial loss in market value, but (2) evidence of altitude and frequency of flights and amount of interference with

enjoyment of the property was sufficient to support a taking, provided that owners could prove substantial market value damage.

Affirmed in part, reversed in part, and remanded.

1. **Eminent Domain**

A taking by airport authority of residential property by reason of aircraft overflights could not be found, and owners were not entitled to inverse condemnation relief, in absence of proof of substantial loss in market value.

2. **Eminent Domain**

Evidence of altitude of aircraft flights over residential property just over a mile from the end of major airport runway, frequency of flights, and amount of interference with enjoyment of the property was sufficient to support a taking, provided that the owners could prove substantial market value damage.

A. Lamar Matthews, Jr., Steven D. Hutton and Martin Garcia of Williams, Parker, Harrison, Dietz & Getzen, Sarasota, for appellant.

S. W. Moore and Alan E. DeSerio of Brigham, Moore, Gaylord, Wilson, Ulmer, Schuster & Sachs, Sarasota, and Alan C. Sundberg and Thomas F. Icard, Jr., of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, for Appellees.

PATTERSON, Judge.

Appellant Sarasota-Manatee Airport Authority (the Authority), defendant below, challenges a partial summary judgment entered in favor of the appellees, plaintiffs below, which finds that a taking has occurred through inverse condemnation and leaves the issues of the extent of the avigational easement and damages, if any, for further proceedings. We have jurisdiction pursuant to Florida Rule of

Appellate Procedure 9.130(a)(3)(C)(iv). The Authority argues that the trial judge erred in finding a taking and not requiring proof of a loss in the property's market value. We agree and reverse.

The appellees own thirty-nine acres of property which lie approximately 5,500 to 6,000 feet northwest of the end of the major runway of the Sarasota-Bradenton Airport. Jet aircraft fly directly over the appellees' property. The minimum glide slope of approaching jet aircraft extends from 148 feet to 188 feet above ground level over the appellees' land.

In 1984 the appellees brought this inverse condemnation action and requested an order of taking compelling the Authority to institute eminent domain proceedings. The appellees claimed that jet airplane overflights have occurred at such altitudes and with such frequency as to have ripened into the taking of an avigational easement over the property. The appellees also alleged that they have been substantially deprived of the residential use of their property due to vibrations, fear, anxiety, fumes, residue, noise, disruption of conversation, and interruption of sleep. The appellees claimed that the aircraft overflights have destroyed the residential character of their property resulting in a marked, substantial decrease in its market value.

[1] The appellees moved for summary judgment on the issue of the Authority's liability for a taking of avigational easements over the appellees' property. At the summary judgment hearing, the parties stipulated that they would not argue the existence of substantial market value impact on the property since there was a factual dispute over whether the property had suffered any market loss. The trial judge granted the appellees' motion for summary judgment on the issue of a taking, but reserved ruling on the extent of the easement taken and the amount of damages. The trial judge found that the appellees need not "concurrently establish legal damage to the property" to prove a taking.

This court's decision in *Fields v. Sarasota-Manatee Airport Authority*, 512 So.2d 961 (Fla. 2d DCA 1987), *rev.*

denied,520 So.2d 5894 (Fla. 1988), supports the Authority's position and dictates a reversal. As in the present case, *Fields* dealt with direct overflights of aircraft, and the plaintiffs sought relief on the theory of the continuing physical invasion of the property due to the direct overflights. The *Fields* court held that because the plaintiffs did not prove a substantial loss in market value, they were not entitled to inverse condemnation relief. "Under the Florida Constitution and Florida case law, a 'decreased increase' of one percent in the value of the landowner's property is not a continuing invasion of property, nor ouster or deprivation of all beneficial use of a landowner's property and does not entitle the landowner to compensation for inverse condemnation." *Fields*, 512 So.2d at 965.

Thus, in the present case the factual dispute over market value damage precludes a grant of partial summary judgment on whether a taking has occurred. The partial summary judgment is reversed and the case remanded to determine whether there was substantial market value damage to constitute a taking, which would then require the Authority to institute eminent domain proceedings.

[2] The Authority also contends that the appellees failed to present sufficient evidence of the altitude of the flights, the frequency of the flights and the amount of interference with the appellees' enjoyment of the property. We hold that the evidence was sufficient to support a taking, provided that the appellees can prove substantial market value damage on remand.

We do not reach the Authority's last point on appeal, because our reversal of the partial summary judgment renders the point moot.

Affirmed in part, reversed in part and remanded.

HALL, A.C.J., and PARKER, J., concur.

Supreme Court, U.S.
FILED
MAY 28 1993

No. 92-1749

In The

Supreme Court of the United States

October Term, 1992

THOMAS F. ICARD, JR., as Trustee,
and FAY ICARD HUSKINS,
as Trustee designate, et al.,

Petitioners,

vs.

SARASOTA-MANATEE AIRPORT AUTHORITY, etc.,

Respondent.

On Petition For A Writ Of Certiorari To The District Court of Appeal of Florida, Second District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this Court has jurisdiction when the only issue addressed in the state court proceedings involved a state law taking claim under Article X, Section 6, of the Florida Constitution and thus a federal question or claim was never raised or decided by the state appellate court.

II. Whether a federal question can be raised when the state court decision of which Petitioners seek review by certiorari was merely an affirmance with citation to a previous decision of that same state court which itself solely addressed an issue of state law.

III. Assuming a federal claim was raised and decided by the state appellate court, whether under the test established by this Court in *Loretto v. Teleprompter of Manhattan CATV Corp.* aircraft overflights are temporary physical invasions and not permanent physical occupations thereby requiring proof of diminution in value to the property in order to prove a taking.

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No. 92-1749

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THOMAS F. ICARD, JR., as Trustee,
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SARASOTA-MANATEE AIRPORT AUTHORITY, etc.,

Respondent.

On Petition For A Writ Of Certiorari
To The District Court of Appeal
of Florida, Second District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Sarasota-Manatee Airport Authority, respectfully prays that the Court deny the Petition for Writ of Certiorari to review the decision of the District Court of Appeal of Florida, Second District.

III. STATEMENT OF CASE

Petitioners' statement of case, although essentially accurate, fails to adequately review the procedural aspects of this case which serve to demonstrate that this

Court is without jurisdiction to review the state appellate court decision. In 1984, Petitioners filed a complaint in the state circuit court in Manatee County, Florida seeking compensation in inverse condemnation from the governing body of the Sarasota-Bradenton Airport, the Sarasota-Manatee Airport Authority (SMAA). Petitioners' complaint, which is included as Appendix "A" to this brief, sought relief under Article X, Section 6 of the Florida Constitution and made no mention of the Fifth or Fourteenth Amendments to the United States Constitution. During this same time period, a group of over 100 landowners living in the vicinity of the airport filed a similar lawsuit, styled *Fields v. Sarasota-Manatee Airport Authority*, based on the same theories as brought by Petitioners and who, not coincidently, were represented by the same attorneys who initially filed the complaint in this case.

The *Fields* case ultimately went to trial in December of 1985 and the trial court entered a final judgment on January 28, 1986 denying the *Fields* plaintiffs their requested relief. The *Fields* plaintiffs subsequently appealed the final judgment to the Florida Second District Court of Appeals. While the *Fields* appeal was pending, Petitioners entered into a joint motion for abatement of this proceeding until all appeals in *Fields* were resolved and for which the trial court entered an order of abatement. The Second District eventually rendered a decision affirming the trial court's final judgment, holding that under the Florida Constitution and Florida case law, the *Fields* plaintiffs were not entitled to compensation for inverse condemnation. The Florida Supreme Court then denied discretionary review of the Second District's decision. *Fields v. Sarasota-Manatee Airport Authority*, 512 So.

2d 961 (Fla. 2d DCA 1987), rev. denied, 520 So. 2d 584 (Fla. 1988).

A majority of the *Fields* plaintiffs then filed suit in the United States District Court, Middle District of Florida, once again alleging that SMAA had failed to pay for avigational easements over their properties and that they were entitled to relief under 42 U.S.C. § 1983 and the Fifth Amendment to the United States Constitution. On January 14, 1991, the district court granted SMAA's motion for summary judgment holding that pursuant to Florida law on *res judicata* the *Fields* plaintiffs' federal law claims were barred because of the prior state court action. On appeal, the Eleventh Circuit Court of Appeals, affirmed the district court's entry of summary judgment although on different grounds than those proffered by the district court in its opinion. *Fields v. Sarasota-Manatee Airport Authority*, 755 F.Supp. 377 (M.D. Fla. 1991), *aff'd*, 953 F.2d 1299 (11th Cir. 1992).

During the pendency of the *Fields* federal lawsuit, Petitioners revived their lawsuit and filed a motion for summary judgment claiming that a finding of market value damages was not necessary in order to conclude that a taking had occurred. Therefore, according to Petitioners, the acknowledged dispute as to market value damage did not preclude summary judgment. The trial court agreed with Petitioners' argument and granted partial summary judgment as to the issue of liability for a taking. Respondent appealed the partial summary judgment to the Second District Court of Appeal. The Second District reversed the trial court's partial summary judgment holding that under its previous decision in *Fields* the factual dispute as to market value impact precluded

summary judgment. Petitioners proceeded to seek discretionary review of that decision by the Florida Supreme Court, which review was denied. *Fields v. Sarasota-Manatee Airport Authority*, 512 So. 2d 961 (Fla. 2d DCA 1987), *rev. denied*, 520 So. 2d 584 (Fla. 1988). No further appeals of that decision were taken.

Rather, Petitioners, upon remand to the trial court, proceeded to trial. After hearing two days of testimony concerning market value impact, the trial court entered a final judgment on July 25, 1991, finding that Petitioners had failed to sustain the burden of proving substantial market value damage and, therefore, denying Petitioners' relief. Petitioners, after the trial court denied their motion for rehearing, appealed the final judgment to the Second District Court of Appeal. The appellate court eventually affirmed the final judgment with citation to its previous decision in *Fields*. After Petitioners post-decision motions were denied, Petitioners filed a notice of invoking discretionary review in the Florida Supreme Court. The Florida Supreme Court summarily dismissed the petition finding that as a matter of law there was no basis for review by that court.

Petitioners have now filed a petition for writ of certiorari in this Court seeking review of the per curiam affirmance with citation decision rendered by the District Court of Appeal of Florida, Second District.

IV. SUMMARY OF ARGUMENT

Throughout the course of proceedings in this case in the State of Florida's judicial system, Petitioners raised

one claim and one claim only – a state law claim for inverse condemnation under the Florida Constitution. No federal claim was ever raised by Petitioners in state court and, unsurprisingly, no federal claim was decided by the Florida court. Because no federal claim was presented to or decided by the state courts, this Court should not accept jurisdiction over the case.

Nor can the Florida intermediate appellate court's single word opinion "affirmed," which has no precedential value under Florida law, be fairly said to raise any conflict with federal law. What Petitioners are really asking this court to review are those earlier Florida decisions, interpreting Florida law, upon which the result in this case is based. The time for review of those cases has long passed, however, and the court should not exercise its extraordinary jurisdiction to review the single word state law decision presently before it.

Finally, even if jurisdiction in this court were appropriate, the Petitioners' arguments fail because the decision below comports with this Court's decisions in *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed. 2d 868 (1982). The petition for a writ of certiorari, therefore, should be denied.

V. ARGUMENT: REASONS FOR DENYING WRIT

A. THE DECISION BELOW DOES NOT DECIDE A FEDERAL QUESTION AND, THEREFORE, THIS COURT DOES NOT HAVE JURISDICTION.

In order for this Court to accept jurisdiction on a writ of certiorari of a state court decision, it is well settled that the record must show that a federal question was both raised and decided in the state court. See *Yee v. City of Escondido*, ___ U.S. ___, 112 S.Ct. 1522, 118 L.Ed. 2d 153 (1992); *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed. 2d 398 (1969). Although Petitioners take great pains in highlighting the occasions upon which this Court's decisions concerning takings claims were cited below, the record is devoid of any reference to the assertion of a federal takings claim and, more importantly, the state court decisions are completely lacking of any references to either the Fifth or Fourteenth Amendment of the United States Constitution. Accordingly, it is abundantly clear that no federal question was presented to or addressed by the state courts in this case. The Court, therefore, has no basis upon which to accept jurisdiction and the Petition for Writ of Certiorari should be denied for that reason.

A review of Petitioners' complaint shows that the only issue raised in the Florida court was an inverse condemnation claim brought under the Florida Constitution. A copy of the initial complaint is reproduced in Appendix "A". As evidenced by paragraph 14 of the complaint, Petitioners' claim was clearly brought under

Article X, Section 6, of the Florida Constitution, the takings provision of the Florida Constitution. Nowhere in Petitioners' complaint is reference made to either the Fifth or Fourteenth Amendments to the United States Constitution or to 42 U.S.C. § 1983 which is the procedural mechanism for asserting a federal takings claim. *See Bannum, Inc. v. City of Ft. Lauderdale*, 901 F.2d 989, 997 (11th Cir. 1990) (§ 1983 provides no substantive rights, it is simply a procedural mechanism by which to raise substantive federal rights).

Further, in initially determining in *Sarasota-Manatee Airport Authority v. Icard*, 567 So. 2d 937 (Fla. 2d DCA 1990), *rev. denied*, 576 So. 2d 288 (Fla. 1991) (*Icard I*), that the trial court had erred in granting partial summary judgment because there was a factual dispute as to market value damage, the Florida Second District Court of Appeal did not cite to any federal cases in its opinion. See Petitioners' appendix "G". Rather, the appellate court held that the trial court was in error based on that court's previous decision in *Fields v. Sarasota-Manatee Airport Authority*, 512 So. 2d 961 (Fla. 2d DCA 1987), *rev. denied*, 520 So. 2d 584 (Fla. 1988). The appellate court's reliance on *Fields* and its subsequent affirmance of the final judgment with citation to the *Fields* decision (Petitioners' appendix "A") leaves little doubt that no federal claim was presented in this case which would provide this Court with jurisdiction.[1] This is so because as the

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[1] It is interesting to note that this case was, in fact, abated at the trial court level until a final resolution of the issues addressed in *Fields*. A copy of the order of abatement is attached hereto as Appendix "B".

Eleventh Circuit Court of Appeals has recognized, no federal claim had been presented to the state court in *Fields*.[2] *Fields v. Sarasota-Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992). In particular, the Eleventh Circuit noted:

> [T]hat the homeowners did not raise their Fourteenth and Fifth Amendment claims in their state court complaint. Neither the Florida trial court nor Florida appellate court relied on federal takings cases to decide what the homeowners had to establish in order to show that they were entitled to compensation for the taking. (Citations omitted). Thus, the district court's finding the Florida courts considered and decided the homeowner's federal claim, *Fields*, 755 F.Supp. at 381, was clearly erroneous.

Id. at 1307 n.9.

Consequently, it is difficult to comprehend how Petitioners can argue that a federal question was decided at the state court level when no federal claim was raised in the pleadings and when the sole decision relied upon by Florida's Second District was one in which *only* a state takings claim was raised and decided. It is clear that the only issue addressed by the state court in this case was a state takings claim under the Florida Constitution and,

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[2] As noted in Respondent's Statement of Case, following their defeat in state court the *Fields* plaintiffs brought a federal taking claim pursuant to 42 U.S.C. § 1983 in federal district court which was similarly unsuccessful. *Fields v. Sarasota-Manatee Airport Authority*, 755 F.Supp. 377 (M.D. Fla. 1991), *aff'd*, 953 F.2d 1299 (11th Cir. 1992).

therefore, no jurisdiction exists for this Court to grant a writ of certiorari.

Notwithstanding their failure to ever raise a federal claim, Petitioners argue in their Petition for Writ of Certiorari that, because they did raise and argue decisions by this Court concerning Fifth Amendment takings throughout the state court proceedings, a federal question exists. First, Petitioners cite no case law to support their position that a federal question arises merely by a party's mentioning decisions of this Court. Second, Petitioners fail to point out that they raised these cases in connection with the Florida Supreme Court's decision in *Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Associations, Ltd.*, 493 So. 2d 417 (Fla. 1986), in which the Florida Supreme Court effectively adopted this Court's decision in *Loretto* as applicable to a state takings analysis under the Florida Constitution.

Therefore, although this Court's decisions were cited by the Petitioners in their arguments to the state courts, these cases were argued not in support of a federal takings claim, but rather, for a state takings claim brought pursuant to the Florida Constitution. Petitioners' reference to federal takings cases in this context does not raise a federal question and bestow jurisdiction on this Court.

Finally, Petitioners fail to explain in their petition how a decision by a state appellate court which merely affirms a trial court judgment by citing to a previous decision of that court can either raise a federal question or conflict with a decision of this Court. Such an affirmance without written opinion has no precedential value and that is the precise reason the Florida Supreme Court

dismissed the petition for review. See *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So. 2d 1369 (Fla. 1980), and Exhibit "F" to Petitioners' appendix. Without a written opinion and without precedential value, it is difficult to perceive how a Florida court's decision could set forth an important federal issue or cause a conflict of decisions which mandates critical review under this Court's extraordinary jurisdiction.

In effect, Petitioners are asking this Court to review the Second District's prior decisions in *Fields* and *Icard I*, and not the affirmance with citation upon which they base their petition. The opportunities to review those earlier decisions have lapsed. If Petitioners truly believed a federal question was involved in this case, they should have appealed the state court's decision in *Icard I* to this Court. See *Nassau Power Corp. v. Beard*, 601 So. 2d 1175, 1178 (Fla. 1992) ("Under established principles of appellate review, a party must appeal the order in controversy, not a subsequent order that merely reiterates established precedent"). The failure to do so demonstrates that no federal question was implicated in the state court proceedings and, thus, no basis for review by certiorari exists for this Court.

B. ASSUMING, ARGUENDO, THAT A FEDERAL QUESTION WAS PRESENTED TO THE STATE COURT, THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE AIRCRAFT OVERFLIGHTS ARE NOT PERMANENT PHYSICAL OCCUPATIONS PURSUANT TO THE CATEGORIES ESTABLISHED BY THIS COURT IN *LORETTO* AND PROOF OF MARKET VALUE DAMAGE IS A PREREQUISITE TO THE FINDING OF A TAKING IN AIRPORT INVERSE CONDEMNATION CASES.

Interestingly, the Florida Supreme Court denied review of the *Icard I* decision notwithstanding Petitioners' assertion that the opinion expressly and directly conflicted with its prior decision in *Storer*. Petitioners' theory that aircraft overflights are per se takings was rejected both by the Second District Court of Appeal and the Florida Supreme Court because such "invasions" are not permanent physical occupations pursuant to this Court's categorization in *Loretto* and the Florida Supreme Court's subsequent holding in *Storer*. Rather, aircraft overflights are temporary physical *invasions* which require a balancing of interests, including a determination of market value impact, before they can rise to the level of a taking.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed. 2d 868 (1982), this Court established the test for determining whether a governmental activity amounts to a per se taking. The Court held that governmental action which amounts to a "permanent physical *occupation*" is a taking without regard to other factors such as economic impact on the property. *Id.*, 102 S.Ct. at 3176 (emphasis added). Once an activity is classified as a permanent physical occupation, a taking

will be found. However, the Court noted that "not every physical *invasion* is a taking." *Id.*, 102 S.Ct. at 3176 n.12 (emphasis in original). The distinctive characteristic of a physical *occupation*, i.e., a per se taking, is its permanence and absolute exclusivity. *Id.* Invasions which do not rise to the level of a permanent physical occupation are "subject to a more complex balancing process to determine whether they are a taking." *Id.* These are the "invasions" which the Court referred to as "physical invasions short of an occupation," i.e., temporary physical invasions. *Id.*, 102 S.Ct. at 3173. Notwithstanding this clear distinction, Petitioners continue to assert that direct aircraft overflights are, categorically, permanent physical occupations that require no proof of market value impact for the finding of a taking. This argument ignores both the English language and the rationale of *Loretto*.

In *Loretto* this court noted that "whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." *Id.*, 102 S.Ct. at 3177. Aircraft overflights are obviously not "permanent physical occupations" because, by their very nature, the invasions are temporary and intermittent. Petitioners' efforts to categorize overflights as "permanent occupations" does not change that reality.

Further, Petitioners' argument ignores the facts of *Loretto*. The taking in *Loretto* resulted from "a direct physical attachment of plates, boxes, wires, bolts and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall." *Id.* There was a permanent physical occupation of a

small, but clearly defined, portion of the plaintiffs' property. If plaintiffs' property were worth $10.00 per square foot, and only one square foot of the property were rendered unusable by attachment of the wires, etc., it is an easy mathematical calculation to conclude that plaintiffs have had $10.00 in property taken from them. The point in *Loretto* is not that a decrease in property value is irrelevant when there is a permanent physical occupation by a governmental entity, but that economic damage clearly results when even a small portion of one's property is permanently appropriated by the government. This is clearly not the case with aircraft overflights.

Nevertheless, Petitioners argue that the majority opinion in *Loretto* specifically identifies the aircraft overflights in *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) as permanent physical occupations. Petitioners are mistaken in their reading of *Loretto*. Justice Marshall, writing for the majority, cites to *Causby* in distinguishing between "a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of the property." *Loretto*, 102 S.Ct. at 3173. The opinion makes no clear statement as to which of these categories *Causby* represents. The dissenting opinion in *Loretto*, however, leaves little doubt that, on the test established by the majority opinion, *Causby* was a "temporary invasion" which required a balancing of interest, and not a taking per se. Justice Blackmun explained:

> Moreover, precedents record numerous other 'temporary' officially authorized invasions by third parties that have intruded into an owner's enjoyment of property far more deeply than did

> Teleprompter's long-unnoticed cable. See, e.g., *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed. 2d 741 (1980) (leafletting and demonstrating in busy shopping center); *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed. 2d 332 (1979) (public easement of passage to private pond)[3]; *U.S. v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) (noisy airplane flights over private land). While, under the Court's balancing test, some of these "temporary invasions" have been found to be takings, the Court has subjected none of them to the inflexible per se rule now adapted to analyze the far less obtrusive "occupation" at issue in the present case. Cf. *ante*, at 3173, 3174-3176.

Loretto, 102 S.Ct. at 3184 (Blackmun, J., dissenting).

Petitioners attempt to tailor the elements of a cause of action for de facto taking of an avigation easement by a loose interpretation of *Causby*. At page 10 of their petition, Petitioners claim, without any citation to the text of *Causby*, that the following are the elements of a de facto taking:

1. Direct overflights of private land.
2. At low altitude.
3. With frequency.
4. Causing a direct and immediate interference with the enjoyment and use of the land.

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[3] In *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987), this Court recategorized the requiring of a public easement of passage on private land as a permanent physical occupation.

Petitioners' petition at page 10. Petitioners conclude that "Market Loss was not, in itself, segregated as an element to this cause of action." Petitioners' petition at 10.

Petitioners' creative reading of *Causby* totally ignores numerous statements by this Court concerning the importance of market value loss in airport inverse condemnation cases. In *Causby* the Court initially noted:

> It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe . . . But that general principle does not control the present case. For the United States conceded on oral argument that if the flights over respondents' property rendered it unhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. (Citation omitted). *Market value fairly determined is the normal measure of the recovery.*

Causby, 66 S.Ct. at 1065-1066 (emphasis added).

The Court also noted that "the use of the airspace immediately above the land would limit the utility of the land and *cause a diminution in its value.*" *Id.*, 66 S.Ct. at 1066 (emphasis added). The Court clearly recognized the essential role of a market value inquiry in determining how low and frequent flights must be and how much the flights must interfere with the enjoyment and use of the land before a taking can be found:

> Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings

> of the Court of Claims plainly establish that *there was diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause.*

Id., 66 S.Ct. at 1068 (emphasis added).

Contrary to Petitioners' contention, nothing in this court's recent decision in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed 2d 798 (1992), abrogates the well-established role of market value in aircraft overflight cases. *Lucas* itself solely addressed the issue of regulatory takings and made plain that a market value analysis was the preeminent concern; the plaintiff was required to prove that the government's regulation "denied him economically beneficial use of his land." *Id.*, 112 S.Ct. at 2893 n.6. Moreover, the court's sole citation to *Causby* was to a portion and footnote of the *Causby* opinion which addressed the hypothetical construction of a cable or bridge over a landowner's property – clearly a permanent physical occupation of airspace – and not to the temporary intermittent invasion of airspace present in *Causby* and here. *Id.*, 112 S.Ct. at 2893 citing *United States v. Causby*, 328 U.S. 256, 265 and n.10, 66 S.Ct. 1062, 1067, and n.10, 90 L. Ed. 1206 (1946). Thus, the one line citation of *Causby* found in the *Lucas* opinion cannot fairly be read to have reversed years of this court's takings precedent by making *any* aircraft overflight a per se taking.

Similarly, in interpreting their own constitutional taking provision, Florida courts have consistently recognized the important role market value plays in an aircraft overflight taking analysis. See *Fields*, 512 So. 2d 961. Indeed, Florida's First District Court of Appeal in *Foster*

v. City of Gainesville, 579 So. 2d 774 (Fla. 1st DCA 1991), specifically cited this Court's decisions in *Causby* and *Griggs v. County of Allegheny*, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed. 2d 585 (1962) as holding that a landowner must demonstrate a diminution in value of their properties in order to obtain relief in inverse condemnation. *Foster*, 579 So. 2d at 776-777. The court in *Foster* recognized that the property owner in an inverse condemnation action "seeks no recovery for his individual suffering, damage, loss of quiet, or other disturbance; rather, recovery is based upon the injury to the market value of the property." *Id.*, 579 So. 2d at 777 n.3, citing *Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989, 85 S.Ct. 701, 13 L.Ed. 2d 610 (1965).

For this reason, courts have uniformly held that proof of substantial market value damage is a prerequisite to relief in an airport inverse condemnation claim. See also *Alevizos v. Metropolitan Airport Commission*, 216 N.W.2d 651 (Minn. 1974). Undaunted by the Florida courts' rejection of their theory that direct aircraft overflights are per se takings which require no proof of market value damage, Petitioners raise this same argument in an effort to overcome their failure to prove the essential element of an inverse condemnation case, market value damage. Petitioners' attempt to sidestep this requirement is unavailing and their petition for writ of certiorari should be denied.

VI. CONCLUSION

For the foregoing reasons, the writ of certiorari to the District Court of Appeal of Florida, Second District, should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE
12th JUDICIAL CIRCUIT IN AND
FOR MANATEE COUNTY, FLORIDA

CASE NO. CA-84-2630

THOMAS F. ICARD, as Trustee, J. PAUL ICARD, as Trustee, THOMAS F. ICARD, as Trustee, THOMAS F. ICARD, and GENE S. ICARD,

Plaintiffs,

vs.

SARASOTA-MANATEE AIRPORT AUTHORITY, a body politic and corporate,

Defendant.

_____/

COMPLAINT

Plaintiffs, THOMAS F. ICARD, as Trustee, as to Sara-Bay II, and J. PAUL ICARD, as Trustee, THOMAS F. ICARD, as Trustee, THOMAS F. ICARD, and GENE S. ICARD, as to the multi-family parcel described below, sue the Defendant, SARASOTA-MANATEE AIRPORT AUTHORITY, and allege that:

1. The Plaintiffs, as listed above, are *sui juris* and are the fee owners of multi-family residential properties, more particularly described as:

A. A multi-family property, described in Exhibit A attached and incorporated by reference herein, containing 37 acres, more or less; and

B. *Sara-Bay II*: a parcel of land situate in Sec. 26 and 27, Twp. 35 S., Rge. 17 E., Manatee County, Florida and being more particularly bounded and described as follows:

Commence at the N.W. corner of said Section 26; thence N 89°48'47" E along the N line of said Sec. 26 238'; thence S 0°17'47" W along the E line of SaraBay Coves, a Condominium, recorded in Condominium Book 3 at Page 77-81 of the Public Records of Manatee County, Florida 638.29' for a POB; thence S 35°09'39" W 644.54'; thence N 54°49'45" W 180.64'± to the Mean High Water line of Sarasota Bay; thence NE'ly along said Mean High Water line 445'± to said SaraBay Coves; thence along said SaraBay Coves the following four (4) courses: S 54°49'09" E 135.10'±; N 35°10'51" E 141.22'; N 0°17'47" E 20.14' and S 89°42'13" E 75' to the POB.

Containing 2.00 acres of land, more or less.

2. The Defendant, Sarasota-Manatee Airport Authority, owns, operates and maintains the Sarasota-Bradenton Airport, located adjacent to U.S. 41 extending over both the Sarasota and Manatee County lines. The Defendant is empowered by Chapter 31263 of the Laws of Florida to sue and be sued in its own name and to plead and be impleaded. The Act further authorizes the Defendant (Airport Authority) to:

> acquire, by gift, purchase or the exercise of eminent domain, any land or *rights in land* deemed necessary in connection with the improvement or operation of its "airport facilities." "Airport facilities" is defined, in part, as "all properties rights, *easements*, and franchises relating thereto."

3. This Court has jurisdiction pursuant to Article V, Section 5, Florida Constitution (1968); Section 26.012, Florida Statutes (1983); Chapters 73 and 74, Florida Statutes (1983); and Section 333.12, Florida Statutes (1983).

INVERSE CONDEMNATION

4. The Defendant, Airport Authority, has, in the proper exercise of its powers, contracted with various commercial airlines for the use and operation of the Sarasota-Bradenton Airport facilities (Airport). Such use and operation includes the right of the airlines to take-off and to land jet and jet-prop aircraft from and on the runways constructed and maintained by the Defendant.

5. From 1970 to 1975 many construction projects took place at the Airport, including the extension and improvement of the main runway, 13-31.

6. Before the expansion and improvement of the airport to its present capacity, the land in the vicinity of the airport, including the Plaintiffs' properties, were zoned and used for residential purposes. Title and/or Beneficiaries' interest in Plaintiffs' property has been continually in Plaintiffs' family, with the exception of Sara Bay II parcel, since before the Sarasota-Bradenton airport was built.

7. In the early and mid-1970's, air traffic levels fluctuated at the airport. Beginning in 1978, however, an unabated, dramatic increase in air traffic has occurred, primarily due to the awarding of multiple routes and airline de-regulation. The nearly trebled increase in commercial airline traffic between 1978 and 1983 has caused a

substantial, qualitative change in the nature of the Sarasota-Bradenton Airport.

8. The continued expansion of the facilities and traffic at the Airport has had a serious impact upon the surrounding residential properties, including that of the Plaintiffs, which are in the path or vicinity of runway 13-31, and its approach areas. Runway 13-31 accounts for over ninety-eight (98%) percent of commercial airline traffic at the airport.

9. The approach areas to the airport runways are designated by State and Federal law. These approach areas extend over or adjacent to the Plaintiffs' properties, down to an extremely low altitude. The increased demand on the approach areas has caused an undue burden to be placed upon the residential land of the Plaintiffs. Such burden of low-altitude flights has ripened into a servitude or easement-in-fact over the lands of the Plaintiffs, as well as severance damages to Plaintiffs' remaining lands. Without the approach areas, the Airport is not operable. Therefore the continued use and operation of the airport facility requires the continued servitude over and on the Plaintiffs' lands.

10. In addition to the actual approach area use, the jet and jet-prop aircraft propagate a noise so severe and deleterious that the appropriate State and Federal health and safety agencies have issued strict guidelines concerning land use compatibility within certain noise impact zones. The impact of this throbbing, piercing noise has further created a servitude or easement-in-fact over the residential properties of the Plaintiffs; as well as severance damages to Plaintiffs' remaining land.

11. The nationally recognized, best available technology in land use planning near airports has designated a hazard area in close proximity to major airport runways. These hazard areas are the most likely zones for catastrophe in the event of human, mechanical, or weather-related aircraft crashes. The Plaintiffs' properties are in the zone which are, or should have been, designated as especially hazardous due to the aircraft operations for which the Defendant is legally responsible. Again, this hazard zone creates a burden on and over the Plaintiffs' lands amounting to an easement-in-fact, as well as severance damages to Plaintiffs' remaining lands.

12 In addition to the low altitude flights within and adjacent to the approach areas over and next to the Plaintiffs' properties, during both day and night, the severe noise impact, and the inclusion of the Plaintiffs into a hazard zone, (all against the will and permission of the Plaintiffs), the Defendant has also substantially deprived the Plaintiffs of the residential use of their properties in one or more of the following means:

a. vibrations;

b. fear and anxiety;

c. disruption of conversation and communication;

d. interruption of sleep;

e. fumes and residue from jet fuel – including the dumping of jet fuel;

f. the loss of the outdoor recreational use of the property.

13. All of the effects listed in paragraph 12 above have destroyed the residential use and character of the Plaintiffs' properties. Such destruction has resulted in, among other things, a marked, substantial decrease in the market value of the Plaintiffs' properties, and has made necessary extraordinary and costly sound-proofing of any new residences built on Plaintiffs' properties, if in law any new residences are permitted.

During the years 1978 to date, there has been no evidence of any relief to the continuously accelerating and worsening conditions.

14. As a direct and proximate result of the increased operation of jet and jet-prop aircraft to and from Defendant's airport, the Defendant has substantially deprived the Plaintiffs of the free and unmolested use and quiet enjoyment of their properties. The Defendant has, by the improvement and expansion of its airport facilities, exercised dominion and control over, appropriated, confiscated and condemned an avigation easement – over the properties of the Plaintiffs, without full compensation, and without due process of law, contrary to Article I, Section 9; Article II, Section 7; and Article X, Section 6, *Florida Constitution* (1968); as well as existing applicable statutory laws.

WHEREFORE, Plaintiffs seek this Court's protection in issuance of an Order of Taking, which determines that the Defendant has taken avigation easements in and caused severance damages to Plaintiffs' properties, at a certain time; describes the estates acquired; and sets a jury trial to determine the full compensation to be awarded the Plaintiffs pursuant to Chapters 73 and 74,

Florida Statutes (1983). Plaintiffs seek a further Order of Court requiring the Defendant to pay to the Plaintiffs all reasonable attorneys fees and costs necessarily incurred as a result of Defendant's course of conduct, as well as an Order setting the applicable prejudgment interest due to these Plaintiffs.

BRIGHAM MOORE MUIR GAYLORD
SCHUSTER & SACHS
Post Office Drawer 428
Sarasota, Florida 33578
(813) 365-3800
Attorneys for Plaintiffs

/s/ S. W. Moore
S. W. Moore

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail to RUSS KOSS, ESQUIRE, Post Office Box 3258, Sarasota, Florida 33578, Attorney for Defendant, this 27 day of November, 1984.

/s/ S. W. Moore
S. W. Moore

A tract of land lying in Sections 26 and 27, together with an island lying in Section 27, all in Township 35 South, Range 17 East, Manatee County, Florida, described as follows:

Commence at a capped iron rod set at the Northwest corner of said Section 26, (the following 6 calls are along

the lines of Sarabay Coves, a Condominium and its recreation area, recorded in Condominium Book 3, Pages 77 through 81 of the Public Records of Manatee County, Florida); thence N89°52'01"E a distance of 238.00 feet for the POINT OF BEGINNING: thence S00°17'47"W a distance of 638.07 feet; thence N89°42'13" W a distance of 75.00 feet; thence S00°17'47"W a distance of 20.14 feet; thence S35°10'51"W a distance of 141.22 feet; thence N54°49'09"W a distance of 135 feet more or less to the mean high water of Sarasota Bay; thence Southwesterly along said mean high water line a distance of 900 feet more or less to the beginning of an island in said Sarasota Bay; thence Southwesterly 140 feet more or less, Northwesterly 200 feet more or less, Southwesterly 830 feet more or less, Southeasterly 270 feet more or less, Northeasterly 380 feet more or less, Southeasterly 370 feet more or less, Northwesterly 620 feet more or less and Northeasterly 210 feet more or less along the mean high water line surrounding said island to a point on the mainland lying 60 feet, more or less, Southeasterly of the beginning of the previously described island; thence Southeasterly, Easterly and Northeasterly along said mean high water line a distance of 1240 feet more or less to its intersection with the common line between Lots 18 and 19, Block "J", Emerald Isles, Unit No. 1, Sheet #2, as recorded in Plat Book 4, Page 90, of the aforementioned Public Records (vacated); thence N24°05'05"E a distance of 163.0 feet; thence N00°06'57"E a distance of 1140.00 feet to a wood post marking the common corner of Lots 10, 11 and 12, Block "E" of said Emerald Isles Subdivision; thence continuing N00°06'57"E a distance of 373.05 feet to the Northerly line of the Northwest 1/4 of said Section 26; thence

S89°48'47"W along said Northerly line a distance of 563.65 feet to a point which lies 238.00 feet N89°48'47" E of the Northwest corner of said Section 26; thence S00°17'47"W a distance of 0.22 feet to the POINT OF BEGINNING, containing 40 acres more or less,

LESS that part of the following described property which lies within the above-described property:

Begin at the Northwest corner of Section 26, Township 35 South, Range 17 East; thence N89°52'01"E along the North line of said Section 26, 673.25 feet for a POINT OF BEGINNING: thence continue N89°52'01"E, 591.55 feet; thence S00°07'59"E to the Northwest corner of that certain triangular shaped parcel of land deeded to the State of Florida, as recorded in Deed Book 373, Page 161, Public Records of Manatee County, Florida; thence S34°58'06"E along the Southwesterly line of said parcel 19.32 feet to the intersection of said line and the West R/W of Tamiami Trail, as set forth in the Plat of Emerald Isles Subdivision, Unit No. 1, Sheet #1, as recorded in Plat Blook 4, Page 90, Public Records of Manatee County, Florida; thence S03°02'49"E along said West R/W, 234.45 feet; thence S89°51'11"W, parallel to the South line of Block "E" of said Emerald Isles Subdivision and 100.0 feet therefrom, 194.93 feet; thence S00°08'49"E, 100.0 feet to the intersection of said line and the South line of said Block "E"; thence S89°51'11"W along the South line of said Block "E" and Westerly extension thereof, 419.60 feet; thence N00°07'59"W, perpendicular to the North line of said Section 26, 375.16 feet to the POINT OF BEGINNING, being and lying in Section 26, Township 35 South, Range 17 East, Manatee County, Florida. Containing 5.0 acres, more or less,

AND LESS the following described property:

A tract of land lying in Sections 26 and 27, Township 35 South, Range 17 East, Manatee County, Florida described as follows:

Commence at a capped iron rod set at the Northwest corner of said Section 26 (the following 2 calls are along the lines of Sarabay Coves, a Condominium recorded in Condominium Book 3, Pages 77 through 81 of the Public Records of Manatee County, Florida); thence N89°52'01"E a distance of 238.00 feet; thence S00°17'47"W a distance of 638.07 feet to the POINT of BEGINNING; thence S35°09'39"W a distance of 644.54 feet to a concrete monument found; thence N54°49'45"W a distance of 180 feet, more or less, to the Mean High Water of Sarasota Bay (passing through a concrete monument found at 170.64 feet); thence Northeasterly along said Mean High Water Line a distance of 445 feet, more or less, to its intersection with the Southerly line of the Recreation Area shown on the aforementioned Plat of Sarabay Coves Condominium (the following 4 calls are along the lines of said Recreation Area and said Sarabay Coves Condominium); thence S54°49'09"E a distance of 135 feet, more or less; thence N35°10'51"E a distance of 141.22 feet; thence N00°17'47"E a distance of 20.14 feet; thence S89°42'13"E a distance of 75.00 feet to the POINT OF BEGINNING, containing 2 acres, more or less.

EXHIBIT "A"

APPENDIX B

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT, IN AND FOR MANATEE COUNTY, FLORIDA.

Civil Action

THOMAS F. ICARD, as Trustee, et al.,

Plaintiffs,

CASE NO. CA-84-2630

vs

SARASOTA-MANATEE AIRPORT AUTHORITY, a body politic and corporate,

Defendant.

ORDER OF ABATEMENT

(Filed Sept. 16, 1986)

THIS CAUSE coming before the Court upon Joint Motion of the parties, the Court having considered the matter, and having been advised by counsel, it is therefore,

ORDERED that this cause is hereby abated until all appeals have been resolved in the current litigation of Fields vs. Sarasota-Manatee Airport Authority, Case No. CA-84-2379. When all appellate proceedings have been resolved in the Fields action, this cause will cease to be abated and be ready to be set for trial upon Motion of the parties.

DONE and ORDERED in Chambers at Sarasota County, Florida, this the 11 day of September, 1986.

/s/ James S. Parker
CIRCUIT JUDGE

Copies to:

Steve Hutton, Esquire
S. W. Moore, Esquire
Clerk of Circuit Court